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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

5 Civ. No. 6622

mitsue takahashi, *Petitioner*

vs.

GOVERNING BOARD OF THE LIVINGSTON UNION SCHOOL DISTRICT; LIVINGSTON UNION SCHOOL DISTRICT OF THE COUNTY OF MERCED, STATE OF CALIFORNIA; COMMISSION ON PROFESSIONAL COMPETENCE; AND DOES I THROUGH V, inclusive, *Respondents*.

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA IN AND FOR THE FIFTH APPELLATE DISTRICT

mitsue takahashi, *Petitioner*

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QUESTION PRESENTED

Whether the dismissal of a tenured public school teacher, whose students have met or exceeded all established academic goals, for failure to "maintain a suitable learning environment" in the absence of objective standards or guidelines against which to evaluate her performance violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA IN AND FOR THE FIFTH APPELLATE DISTRICT

Petitioner MITSUE TAKAHASHI respectfully prays that a writ of certiorari issue to review the decision of the Court of Appeal of the State of California in and for the Fifth Appellate District entered in the above-entitled action on June 20, 1983.

OPINIONS BELOW

On November 16, 1980, respondent COMMISSION ON PROFESSIONAL COMPETENCE of the LIVINGSTON UNION SCHOOL DISTRICT issued its decision dismissing petitioner from her teaching position at the Livingston Union School District.

On June 9, 1981, the Superior Court for the County of Merced, State of California, sustained the findings of respondent COMMISSION ON PROFESSIONAL COMPETENCE and entered judgment denying petitioner's writ of mandate. That judgment is printed in Appendix A hereto, *infra*, page 1.

The Court of Appeal of the State of California in and for the Fifth Appellate District affirmed the judgment of the Superior Court for the County of Merced in an opinion filed on June 20, 1983. That opinion is printed in Appendix A hereto, *infra*, page 2, and is reported at 44 Cal. App. 3d. 27 (1983).

The Court of Appeal of the State of California in and for the Fifth Appellate District denied petitioner's petition for rehearing on July 14, 1983. That order is printed in Appendix A hereto, *infra*, page 16.

On August 17, 1983, the California Supreme Court denied petitioner's request for hearing, R. Bird, C. J., dissenting. That order is printed in Appendix A hereto, *infra*, page 18.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

1. The Fourteenth Amendment to the United States Constitution, Section 1.
2. California Education Code §§ 44660 and 44662.

The full text of these constitutional and statutory provisions is set out in Appendix B hereto.

QUESTION PRESENTED

Whether the dismissal of a tenured public school teacher, whose students have met or exceeded all established academic goals, for failure to "maintain a suitable learning environment" in the absence of objective standards or guidelines against which to evaluate her performance violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

STATEMENT OF CASE

Petitioner MITSUE TAKAHASHI, a graduate of Stanford University and a veteran educator with twenty-one years of teaching experience, was discharged from her junior high school teaching position by respondent LIVINGSTON UNION SCHOOL DISTRICT in 1980 on the grounds of incompetency. Respondent's charges of incompetence were based solely upon petitioner's alleged failure to "maintain a suitable learning environment." Yet it is undisputed that petitioner was consistently successful in insuring that every one of her students met or exceeded all of the academic goals established by respondent LIVINGSTON UNION SCHOOL DISTRICT. (Appendix A, *infra*, page 10, fn. 4.)

Prior to 1978 respondent LIVINGSTON UNION SCHOOL DISTRICT noted no deficiencies in petitioner's job performance. Greg Fitzgearl, petitioner's principal from approximately 1967 to 1977, visited petitioner's classroom thirty to forty times per year and gave her uniformly good evaluations. (RT 216-217, 221). In 1977 Dale Eastlee as-

sumed the position of principal with little experience in junior high school administration. (RT 34) In 1978 he began observing some incidents which in his opinion indicated that petitioner's classroom was not orderly.

At the hearing before respondent COMMISSION ON PROFESSIONAL COMPETENCE, Mr. Eastlee admitted that he had no independent recollection of any of the incidents forming the basis of the charges against petitioner and that he could not recall what petitioner had stated to him regarding such incidents during his conferences with her. (RT 56-57).

Mr. Eastlee left respondent LIVINGSTON UNION SCHOOL DISTRICT in 1979 and was replaced by Hamilton Brannan, who also documented situations which he felt showed that petitioner was an inadequate disciplinarian. However, in the 1979-80 academic year, petitioner was assigned an eighth grade class with a disproportionate number of problem students, several pupils with significant language handicaps, and a child requiring special education instruction. (RT 222-223, 323, 369). Even though her teaching colleagues were unaware that petitioner was being considered for dismissal, they talked among themselves about the unfair burden placed upon her by such assignments. (RT 204, 222-223).

Despite these obstacles, all of petitioner's students met the 1979-1980 academic goals established by the principal. (RT 182, Appendix A, *infra*, page 10, fn. 4). In 1980, however, Mr. Brannan recommended that petitioner be discharged for failing to properly control her junior high school pupils. On June 26, 1980 the Board of Trustees of respondent LIVING-

STON UNION SCHOOL DISTRICT issued petitioner a Notice of Intention to Dismiss.

The allegations that petitioner failed to "maintain a suitable learning environment" were based upon such incidents as two students fighting upon entering her classroom, students responding spontaneously to her questions without raising their hands, a pupil uttering an obscenity in class without being reprimanded by petitioner, and two boys wrestling and yelling outside the back door of her classroom. (Appendix A, *infra*, pages 4-5).

After she was recommended for dismissal, petitioner was assigned to the position of substitute teacher in the 1980-81 academic year and performed her job duties in an excellent fashion. (RT 329). She also served as a resource teacher, a position in which she was so successful that the teachers wrote to respondent LIVINGSTON UNION SCHOOL DISTRICT urging her retention in that capacity. (CT 129).

It is undisputed that neither the respondent GOVERNING BOARD OF THE LIVINGSTON UNION SCHOOL DISTRICT nor petitioner's principals ever established any objective, uniform guidelines or standards to evaluate whether petitioner was sufficiently controlling her class or "maintaining a suitable learning environment." (RT 184). Moreover, respondents admitted that no objective comparisons were made between petitioner's eighth grade classroom and other eighth grade classrooms or between the learning achieved by petitioner's students and those in other classes. (RT 184, 161-162, 164).

Despite the lack of any objective standards, criteria, or

guidelines against which to judge petitioner's performance, respondent COMMISSION ON PROFESSIONAL COMPETENCE of LIVINGSTON UNION SCHOOL DISTRICT voted 2-1 to discharge petitioner for failing to "maintain a suitable learning environment." (RT 27, 82, CT 190-192).

On December 4, 1980 petitioner filed a writ of mandate with the Merced County Superior Court on the grounds that her dismissal violated her rights not to be deprived of property or liberty without due process of law in contravention of the Stull Act, specifically Education Code §§ 44660 and 44662, which requires school boards to "establish a uniform system of evaluation and assessment of the performance of all certificated personnel" which "shall involve the development and adoption by each school district of objective evaluation and assessment guidelines." Although it was again undisputed that no such guidelines were ever established by respondents to assess whether petitioner was "maintaining a suitable learning environment", the Superior Court entered judgment denying the petition for writ of mandate. (Appendix A, *infra*, page 1).

The Court of Appeal of the State of California in and for the Fifth Appellate District affirmed the judgment of the trial court. It reasoned that petitioner's discharge did not violate the Stull Act because the statutory requirement of Education Code §§ 44660 and 44662 that school boards establish objective guidelines for evaluation of personnel does not specify that school boards cannot dismiss teachers in the absence of such mandated guidelines. In response to petitioner's arguments that the dismissal violated her Fourteenth Amendment rights to due process of law, the Court of Ap-

peal decided that discharges for incompetence are exempted from the constitutional requirement that objective standards be utilized in dismissing public school teachers. (Appendix A, *infra*, page 13).

REASONS FOR GRANTING THE WRIT

THE DECISION OF THE COURT OF APPEALS IS IN CONFLICT WITH BOTH FEDERAL AND STATE DECISIONAL LAW REGARDING A SUBSTANTIAL AND IMPORTANT FEDERAL QUESTION

The California Court of Appeal's interpretation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution as it applies to teacher dismissals conflicts not only with the federal case law but also with the decisions of the California Supreme Court.

In the seminal case of *Connally v. General Construction Company*, 269 U.S. 385, 392, 46 S. Ct. 126, 70 L.Ed. 322 (1927) the United States Supreme Court determined that a "statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law." This requirement applies to civil as well as criminal cases, *Jordan v. De George*, 341 U.S. 223, 231, 71 S. Ct. 703, 95 L. Ed. 886 (1951), and specifically to public teacher dismissals. *Cramp v. Board of Instruction of Orange County, Florida*, 368 U.S. 278, 82 S. Ct. 275, 7 L. Ed. 2d 285 (1961).

It is clear that dismissal criteria must be "sufficiently specific to fulfill the dual requirement of enabling the pro-

fessor to guide his conduct and providing a definite standard by which the professor's conduct can be evaluated." Note, *Dismissing Tenured Faculty: A Proposed Standard*, 54 N.Y.U.L. Rev. 827, 834 (1979). See also Rosenberger & Plimpton, *Teacher Incompetence and the Courts*, 4 J. L. & EDUC. 469, 469-70 (1975). As the scholars have commented,

Court interpretation, extrapolation, and rule promulgation have been necessary to 'make more definite and certain the inexact standards created by the legislature' or adopted by the governing board and to give meaning to the term 'academic tenure.' Note, *Academic Tenure: The Search for Standards*, 39 S. CAL. L. REV. 593, (1966).

See also, Black, *Attorney Discipline for "Offensive Personality" in California*, 31 HASTINGS L. J. 1097, 1127-28 (1979-80). Note, *License Revocation: Uncertainty and Due Process*, 15 HASTINGS L. J. 339 (1963-64).

For example, in *Burton v. Cascade School District Union High School*, 353 F. Supp. 254 (D. Oregon 1973), Ms. Burton was dismissed from her teaching position for "immorality" based upon her admission that she was a practicing homosexual. The court found such a criterion for discharge to be unconstitutionally vague because:

. . . [t]he statute does not define immorality. Immorality means different things to different people, and its definition depends upon the idiosyncracies of the individual school board member. It may be applied so broadly that every teacher in the state could be subject to discipline. The potential for arbitrary and discriminatory enforcement is inherent in such a statute. 353 F. Supp. at 255.

Precisely the same condemnation could be made of the phrase "maintenance of a suitable learning environment." Placing such discretion with school board members, the court stated, "subjects the livelihood of every teacher in the state to the irrationality and irregularity" of their judgments. 353 F. Supp. at 255.

In *Parducci v. Rutland*, 316 F. Supp. 352 (M.D. Ala. N.D. 1970), a high school teacher was discharged for assigning reading which had a "disruptive effect" on her students and for insubordination in contending that she thought such reading to be appropriate. Numerous parents complained and three students asked to be excused from the assignment.¹

The teacher challenged her discharge on the grounds that the school district had "no written or announced policy . . . governing the selection and assignment of outside materials." 316 F. Supp. at 356. In ruling that her dismissal violated the Due Process Clause, the court stated:

Our laws in this country have long recognized that no person should be punished for conduct unless such conduct has been proscribed in clear and precise terms . . . When a teacher is forced to speculate as to what is proscribed, he is apt to be overly cautious and reserved in the classroom. Such a reluctance on the part of the teacher to investigate and experiment with new and different ideas is anathema to the entire concept of academic freedom. 316 F. Supp. at 352.

See also *Dean v. Timpson Independent School District*, 486 F. Supp. 302, 308-309 (1979).

¹There was greater parental and student opposition concerning this one incident than was shown by students and parents in petitioner's case during the entire three years she was allegedly incompetent.

The California Supreme Court has closely followed the federal precedents in applying the Due Process Clause to teacher dismissals. In *Morrison v. State Board of Education*, 1 Cal. 3d 214, 82 Cal. Rptr. 175, 461, P. 2d 375 (1969), the Supreme Court upheld a challenge to the revocation of a teaching certificate for immoral and unprofessional conduct and acts involving moral turpitude pursuant to the then Education Code § 13202 [now Education Code § 44932 (a)]. Morrison, who had engaged in a homosexual relationship with a fellow teacher, contended that the words "unprofessional conduct", "immoral conduct", and "moral turpitude" were so vague that the revocation of his diploma on such grounds denied him due process of law. 1 Cal. 3d. at 230-231.

The court concluded that Education Code § 13202 could only withstand constitutional attack on vagueness grounds by a judicial interpretation of the phrases "unprofessional conduct", "immoral acts", and "moral turpitude" which required the trier of fact to find that the teacher was "unfit to teach" according to several specific criteria established by the court. 1 Cal. 3d. at 229.

Noting that statutes must be "sufficiently clear as to give a fair warning of the conduct prohibited, and must provide a standard or guide against which conduct can be uniformly judged by courts and administrative agencies," the court determined that dismissal criteria such as "immoral conduct", "unprofessional conduct", and "moral turpitude" without a narrowing standard set by the courts "would be susceptible to so broad an application as possibly to subject to discipline virtually every teacher in the state." 1 Cal. 3d. at 231-225.

A sweeping provision purporting to penalize or sanction so large a group of people as to be incapable of effective enforcement against all or even most of them necessarily might offend due process. Such a statute, *unless narrowed by clear and well-known standards*, affords too great a potential for arbitrary and discriminatory application and administration. (emphasis mine) 1 Cal. 3d. at 225.

San Dieguito v. Commission on Professional Competence, 135 Cal. App. 3d. 278, 185 Cal. Rptr. 203 (1982), made it clear that the standards established in *Morrison, supra*, are not limited to teacher dismissals for unprofessional or immoral conduct. In *San Dieguito*, a teacher was discharged for excessive absenteeism which allegedly interfered with the teaching process. She had received numerous written and oral warnings regarding the "negative effects" of her absenteeism so she was clearly "on notice" that the school district was concerned about her behavior. 185 Cal. Rptr. at 205.

The court found that the phrase "evident unfitness to teach" was subject to the same constitutional objections as "immoral conduct" and "unprofessional conduct". Hence, according to the court, "without the *Morrison* standards 'evident unfitness to teach' would be vulnerable to such a broad application virtually every teacher in the state could be subject to discipline and discharge." 185 Cal. Rptr. at 206. Hence, the Commission on Professional Competence must use an "objective and analytical approach" considering all the *Morrison* guidelines in determining fitness to teach: (1) likelihood of recurrence of the questioned conduct; (2) extenuating or aggravating circumstances; (3) effect of notoriety and publicity; (4) impairment of teacher-student

relationships; (5) disruption of the education process; (6) motive; and (7) proximity or remoteness in time of conduct.

The court concluded that:

The *Morrison* standard gives substance to the tenured teacher's right to be discharged only for cause. If the *Morrison* standards are not applied, the teacher is left essentially at the mercy of the Board (or the trial court) to be discharged whenever cause exists in the subjective estimation of either body. Such a procedure would make a shambles out of the tenure and job security now enjoyed by teaching employees. 185 Cal. Rptr. at 208.

These same "fitness to teach" criteria were applied in *Blodgett v. Board of Trustees*, 20 C.A. 3d. 183, 97 Cal. Rptr., 406 (1971), in which a probationary teacher of physical education was denied re-employment because her obesity allegedly restricted her ability to perform her teaching duties. The evidence showed that she was unable to demonstrate certain movements in class because of her size, that she was often the object of ridicule when she utilized physical educational techniques, and that some students declined to take her classes and made derogatory comments about her weight. She was observed several times on a weekly basis by a teacher who testified that her weight interfered with her effectiveness as a teacher. 20 C. A. 3d at 186-189. However, because the Board of Trustees had failed to demonstrate by the *Morrison* criteria mandated by the Fourteenth Amendment that she was unfit to teach, the court entered judgment for the teacher.²

²Similarly, in *Blake v. State Personnel Board*, 25 C.A. 3d. 541, 102 Cal. Rptr. 50 (1972) a deputy labor commissioner was dismissed from state employment for "discourteous treatment of other employees" when he pointed a gun at them. The court stated:

In marked contrast with both federal and state precedent, the Court of Appeals decided in the case at bar that a public school teacher could be dismissed *in the absence* of the objective standards required by the Fourteenth Amendment to the U. S. Constitution.³ The court reasoned that the uniform criteria required to discharge teachers for other reasons are not constitutionally mandated in dismissals for incompetency. It stated that a lack of "objective standards" for dismissals involving such causes as "excessive absenteeism, sex offenses, or drug violations" would "vest unbridled discretion in the districts and trial courts" but that such a danger is not present in incompetency discharges because of the

The conduct proscribed under subdivision (m), 'discourteous treatment . . . of . . . other employees', though more specific than such terms as 'unprofessional' or 'immoral' conduct, can literally extend over a wide range of conduct and thereby be subject to the constitutional objection of vagueness unless it is limited by guidelines which fairly apprise an employee of the type of misbehavior which may subject him to disciplinary action and against which his conduct may be rationally judged by courts and administrative agencies. 25 C.A. 3d. at 550. See also *McMurtry v. State Board of Medical Examiners*, 180 C.A. 2d. 760, 4 Cal. Rptr. 910 (1960).

³The due process deficiencies in this action were exacerbated by the fact that respondent LIVINGSTON UNION SCHOOL DISTRICT failed to even evaluate petitioner in comparison with other eighth grade teachers as noted above. Such a failure proved fatal in two recent cases which bear a marked similarity to this matter. In *Williams v. Pittard*, 604 S. W. 2d 845 (Tenn. 1980) a teacher was discharged for her inability "to maintain appropriate control of her class." 604 S. W. 2d. at 848. Because there was no objective showing that her "standard of efficiency" was actually lower than that of the other teachers, 604 S. W. at 850, she was reinstated. Similarly, in *Hollingsworth v. Board of Education of School District of Alliance*, 303 N. W. 2d. 56 (Nebraska 1981) the teacher was dismissed because he was "unable to control his classroom and to handle students' misbehavior." 303 N.W. 2d, at 508. The principal's evaluation was "suspect", however, because "he failed to compare Mr. Hollingsworth's performance with other staff members' performances." In reversing the discharge, the court stated that incompetency "must be measured against the standard required of others performing the same or similar duties." 303 N. W. 2d. at 512-513.

"allegations of specific conduct" of which the teacher has notice. (Appendix A, *infra*, page 13.) This rationale, however, entirely misses the point.

The issue is not whether petitioner had notice of the specific allegations against her. The teacher in *San Dieguito, supra*, received numerous such notices. 185 Cal. Rptr. at 205. As the Supreme Court stated in *Morrison, supra*, the question is whether there is a "*standard or guide* against which conduct can be uniformly judged by courts and administrative agencies." (emphasis mine) 1 Cal. 3d. at 230. The need for such guidelines exists equally in incompetency cases and dismissals for other causes.

There can be no question that the "establishment and maintenance of a suitable learning environment" is just as vague and ambiguous a phrase as "immoral conduct" or "moral turpitude". In fact, within the teaching profession there would probably be more agreement about what constitutes "immoral conduct" than about the meaning of "suitable learning environment."

In *Morrison, supra*, the court thought it was significant that a recent study by the California State Assembly had demonstrated that educators differed among themselves regarding the meaning of "unprofessional conduct." 1 Cal. 3d. at 225. A study of the scholarly writing in the field of education on the subject of student discipline and control of the classroom shows that there is more disagreement and debate among educators about what constitutes a "suitable learning environment" than about almost any other issue confronting teachers today. As the literature notes,

. . . there is no universal agreement on means or methods, or even on what behavior should be controlled. Debates rage over these matters in the courts, in the journals, and at school board meetings. Out of all this come the programs, the rules, the regulations, and methods of governing the control of disruptive student behavior. Dunlop, *Should Methods to Deal With Student Discipline Be Negotiated With Teacher Organizations?*, The NEA Perspective, 6 J. of LAW and EDUCATION 63, 66 (1977).

The difficulty of assessing whether proper control is being maintained is discussed in an enlightening law review article on the subject:

[T]he need for order must be viewed in the context of the goals of quality education; chaos and disruption which have been created for their own sake must be distinguished from that short-term commotion which always accompanies sudden interest or discovery and which leads to long-term involvement and order; deviations from the prescribed curriculum which represent inefficient use of class time must be distinguished from those which are intended to achieve a legitimate educational objective . . .

The maintenance of order in classroom and school is not a sufficient prerequisite to quality education; equally necessary is the maintenance of that degree of teacher classroom flexibility which will enable the teacher to capitalize on those opportunities to convey the skills of perception, analysis, and creativity, even though the method he chooses may be offensive to some and temporarily disruptive." Note, *Teacher Classroom Flexibility*, 47 SO. CAL. L. REV. 1528, 1529, 1544-45 (1974).

Because of the absence of objective standards and the widely disparate views which exist among teachers on the subject of discipline, the situation which was foreseen by the court

in *San Dieguito, supra* at 208, occurred in the case at bar. Contrary to constitutional mandate, petitioner was discharged because, in the subjective estimation of her principal and respondent GOVERNING BOARD OF THE LIVINGSTON UNION SCHOOL DISTRICT, she did not maintain control over her class.

For example, in the instant case the allegation that petitioner was observed ignoring disruptive and inappropriate behavior was viewed as substantial evidence of her inability to maintain a "suitable learning environment." A significant number of renowned educational experts, however, contend that petitioner's "ignoring" response, far from showing incompetence, demonstrated the *most effective* and best approach to a discipline problem.

As noted by Workman, Kensall, and Williams:

A number of investigations have clearly demonstrated that students' disruptive and off task behaviors in the classroom can be modified through the use of systematic praise for appropriate behaviors and ignoring of inappropriate behaviors. "The Consultative Merits of Praise-Ignore Versus Praise-Reprimand Instruction," 18 JOURNAL OF SCHOOL PSYCHOLOGY 373, 373 (1980).

The Workman research concluded that the "praise-ignore combination" resulted in "more long-lasting effects" on student discipline and was a far more effective educational technique than the use of reprimands or sharp verbal rebukes to control behavior. *Workman, supra* at 378. See also Cope-land and Hall, "Behavior Modification in the Classroom", in Hensen, Eisler, and Miller, eds. PROGRESS IN BEHAVIOR MODIFICATION, Vol 3 (Academic Press 1976); Madsen, Madsen, Saudargas, Hammond, Smith, and

Edgar, Classroom RAID (Rules, approval, ignore, disapproval): A Cooperative Approach for Professionals and Volunteers, 8 JOURNAL OF SCHOOL PSYCHOLOGY 180-185 (1970); Hymand and Lally, Discipline in the 1980's — Some Alternatives to Corporal Punishment, 11 CHILDREN TODAY 10, 12 (Jan-Feb. 1982); Thoresen, ed., BEHAVIOR MODIFICATION IN EDUCATION, The 72nd Yearbook of the National Society for the Study of Education, Part 1, 90, 192 (U. of Chicago Press 1973).

In fact, the *ability* to ignore disruptive student behavior is viewed by many educators as a rare talent. According to Laurel Tanner the "ignore" technique "is not necessarily the easiest strategy . . . The inability to ignore is the great weakness of many otherwise good teachers." CLASSROOM DISCIPLINE FOR EFFECTIVE TEACHING AND LEARNING (Hall, Rinehart, and Winston 1978) at 161.

From the perspective of the more traditional administrators in Livingston, California, a small farming town in the San Joaquin Valley, the environment in petitioner's classroom might not have been sufficiently controlled or orderly. However, to the thousands of both public and private school teachers who now employ the "open instruction" techniques used in Great Britain for decades, the atmosphere in petitioner's classroom probably would have appeared too rigid and authoritarian to encourage maximum learning.

In the "open classroom", several small groups are engaged in different types of activities and students are encouraged to move around the classroom and to speak out spontaneously. Charles Silberman, CRISIS IN THE CLASSROOM: THE REMAKING OF AMERICAN EDUCATION 290

(Random House 1970). This "open classroom" concept is an established and well-recognized approach to teaching. Over two hundred separate studies of the method have validated its effectiveness. Walbert, ed. EDUCATIONAL ENVIRONMENTS AND EFFECTS: EVALUATION, POLICY, AND PRODUCTIVITY 276 (McCutchan Press 1970). In spite of the success of the "open classroom", however, the teacher who elects to adopt this educational technique is sometimes faced with a "principal who complains about the noise or about children moving about." Silberman, CRISIS, *supra* at 290.

Petitioner's classroom was considerably more traditional and authoritarian than the true "open classroom." Petitioner's disciplinary methods, however, borrowed some of the "open classroom" approaches which have proven successful. It is indeed ironic that such techniques form the basis of the allegations against petitioner.

It is the purpose of the Due Process Clause of the Fourteenth Amendment to protect such decision-making from arbitrary attack. As the court noted in *Morrison, supra*, the requirement of narrow, uniform guidelines assures that teachers "cannot be disciplined merely because they made a reasonable, good faith, professional judgment in the course of their employment with which higher authorities later disagreed." 1 Cal. 3d. at 233. See also *Lindros v. Governing Board of Torrance Unified School District*, 9 C. 3d. 524, 538 108 Cal. Reprtr. 185, 510 P. 2d. 361 (1973).

CONCLUSION

For the foregoing reasons petitioner respectfully prays that this petition for a writ of certiorari be granted.

Dated, Fresno, California,

November 4, 1983.

Respectfully submitted,

FRAMPTON, KARSHMER & KESSELMAN

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MITSUE TAKAHASHI

APPENDIX A

PAUL M. LOYA
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FILED
 June 30, 1981

 Merced County Clerk
 By DEBRA DEAN
 Deputy

SUPERIOR COURT OF CALIFORNIA
 COUNTY OF MERCED

CTA; MITSUE TAKAHASHI,
Petitioners,

v.

No. 65267

LIVINGSTON UNION SCHOOL DISTRICT,
 et al.,
Respondents.

JUDGMENT DENYING WRIT OF MANDATE

The above-entitled action came on regularly for hearing on May 1, 1981 in the above-entitled Court, The Honorable Donald R. Fretz, presiding; Ernest H. Tuttle III appearing for petitioners and Paul M. Loya appearing for respondent.

Upon the verified Petition of petitioner, the Answer of respondent and Points and Authorities submitted by both parties; upon the Court's application of the independent judgment test and review and examination of the records, transcripts, exhibits, evidence and decision in the administrative proceedings of the Commission on Professional Competence; and upon arguments having been presented and the matter having been submitted for decision and the Court

having made Findings of Fact and Conclusions of Law,
which have been signed and filed,

IT IS ORDERED THAT:

1. The Petition filed herein for Writ of Mandate is denied.
2. The action on file herein is dismissed.
3. Petitioner be granted no relief by virtue of his Petition.
4. Respondent shall recover costs.

Dated: June 9, 1981.

DONALD R. FRETZ

Judge of the Superior Court

Court of Appeal
Fifth Appellate District
FILED
JUNE 20, 1983
Kevin A. Swanson, Clerk

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

CALIFORNIA TEACHERS ASSOCIATION

et al.,

Plaintiffs and Appellants,

v.

GOVERNING BOARD OF THE

LIVINGSTON UNION SCHOOL

DISTRICT et al.,

Defendants and Respondents.

5 CIVIL No. 6622

(F000235)

(Super. Ct.

No. 65267)

OPINION

APPEAL from a judgment of the Superior Court of Merced County. Donald R. Fretz, Judge. Affirmed.

Tuttle & Tuttle, Ernest H. Tuttle III and Kay M. Tuttle for Plaintiffs and Appellants.

Mary Louise Frampton as Amicus Curiae on behalf of Plaintiffs and Appellants.

Atkinson, Andelson, Loya, Ruud & Romo, Paul M. Loya and Brian M. Libow for Defendants and Respondents.

Plaintiffs, California Teachers Association (CTA) and Mitsue Takahashi, appeal from the trial court's judgment which denied a writ of mandate commanding defendants, the Governing Board of the Livingston Union School Dis-

trict, the Commission on Professional Competence of the Livingston Union School District and the Livingston Union School District (district) to set aside their decision terminating the district's employment of Takahashi, a permanent certified schoolteacher. We affirm the judgment.

The principal issue on appeal is whether the district's failure to adopt uniform objective guidelines for evaluation and assessment of the classroom management performance of all its certificated personnel, pursuant to Education Code section 44660¹ et seq. (the Stull Act)² precludes it from giving to the affected employee a valid 90-day written notice of charges of incompetency as required by section 44938.³

¹Section 44660 provides as follows:

"It is the intent of the Legislature that governing boards establish a uniform system of evaluation and assessment of the performance of all certificated personnel within each school district of the state, including schools conducted or maintained by county superintendents of education. The system shall involve the development and adoption by each school district of objective evaluation and assessment guidelines which may, at the discretion of the governing board, be uniform throughout the district or, for compelling reasons, be individually developed for territories or schools within the district, provided that all certificated personnel of the district be subject to a system of evaluation and assessment adopted pursuant to this article.

"This article does not apply to certificated personnel who are employed on an hourly basis in adult education classes."

All statutory references are to the Education Code unless otherwise specified.

²Statutes 1971, chapter 361, section 40, page 726.

³Section 44938 provides as follows:

"The governing board of any school district shall not act upon any charges of unprofessional conduct or incompetency unless during the preceding term or half school year prior to the date of the filing of the charge, and at least 90 days prior to the date of the filing, the board or its authorized representative has given the employee against whom the charge is filed, written notice of the unprofessional conduct or incompetency, specifying the nature thereof with such specific instances of behavior and with such particularity as to furnish the employee and opportunity to correct his faults and overcome the grounds for such charge. The written notice shall include the evaluation made pursuant

STATEMENT OF FACTS

Mitsue Takhashi was an eighth grade teacher at Selma Herndon School in the Livingston Union School District in Livingston, California. She had been employed by the district, at the time of the hearing before the Commission on Professional Competence, for a period of 21 years. On five occasions, during the period from January 9, 1978, through May 16, 1979, Dale Eastlee, principal at Selma Herndon School, observed discipline problems in the classroom of Takahashi. These problems included students fighting, playing soccer in the classroom, yelling over the school intercom, yelling out the back door of the classroom, wrestling, throwing pencils and other disruptive activities. Additionally, a maintenance worker who was working in Takahashi's classroom on May 8, 1978, overheard students using vulgar language. He did not hear Takahashi take any action to terminate use of that language or to caution against recurrence.

In August 1979, Hamilton Brannan became principal at Selma Herndon School. He observed Takahashi's classroom on six occasions between September 26, 1979 and March 20, 1980. Each time, he noted a lack of planning and focus in Takahashi's teaching. He once heard a student screaming at Takahashi for so long with no response from Takahashi that he was forced to remove the student from the classroom. He observed students engaging in a tug-of-war over some tape, which Takahashi was unable to stop, and students disregard-

to Article 11 (commencing with Section 44660) of Chapter 3 of this part, if applicable to the employee. 'Unprofessional conduct' and 'incompetency' as used in this section means, and refers only to, the unprofessional conduct and incompetency particularly specified as a cause for dismissal in Sections 44932 and 44933 and does not include any other cause for dismissal specified in Section 44932."

ing Takahashi's instructions on classroom demeanor in shouting out questions and answers. On April 15, 1980, at the request of Brannan, a principal at a school in a neighboring district observed Takahashi's classroom performance. That person, from outside the district, noted that Takahashi's questions to the class prompted loud and confusing total group responses, that she failed to draw any response from the quieter students, and that she ignored inappropriate student behavior which resulted in an unordered classroom environment. Twice during the 1979-1980 school year students were transferred out of Takahashi's class at the request of the students' parents. The reasons stated for the transfer were disorder and lack of discipline in the classroom which interfered with the students' learning.

On January 8, 1980, the superintendent of the district handed Takahashi a letter over his signature notifying her of specified acts of incompetency. Appended to that letter was a formal evaluation form dated November 15, 1979 prepared by Brannon, a copy of a letter from the superintendent to Takahashi dated April 23, 1979, also notifying her of specified acts of incompetency, and a copy of a formal evaluation form prepared by Dale Eastlee, dated April 18, 1979. Later, a notice of accusation, dated June 26, 1980, was served upon Takahashi. Appended to that notice was an accusation filed with the governing board of the district alleging that cause existed to dismiss Takahashi. Takahashi demanded and received a hearing before the Commission on Professional Competence (commission) of the district, Rudolph H. Michael, Administrative Law Judge, presiding. On November 6, 1980, the commission issued its decision containing findings of fact and determining, among other things, that the cause

for dismissing Takahashi had been established and that the notice given to her on January 8, 1980, complied with the procedural requirements of section 44938.

Takahashi commenced a proceeding in mandamus (Code Civ. Proc., § 1094.5) to compel the commission to set aside its decision. In that proceeding, the trial court found as follows: (1) cause for dismissal had been established, (2) each of the notices which the district gave Takahashi complied with the procedural requirements of section 44938 and the evaluations attached to those notices complied with section 44660, et seq. and (3) Takahashi's alteration of her testimony before the commission constituted unclean hands.

DISCUSSION

Jurisdiction To Act Upon The Accusation Of Incompetency

Initially, we note that the trial court's determination that the notice given to Takahashi on January 8, 1980, complied with the procedural requirements of section 44938 necessarily involves interpretation of the statute. Such interpretation is a question of law, and an appellate court is not bound by evidence presented in the trial court. (*California Teachers Assn. v. San Diego Community College Dist.* (1981) 28 Cal.3d 692, 699.) In construing a statute, the fundamental rule is that the appellate court should ascertain the intent of the Legislature so as to effectuate the purpose of the law. (*Palos Verdes Faculty Assn. v. Palos Verdes Peninsula Unified Sch. Dist.* (1978) 21 Cal.3d 650, 658.) To ascertain such intent the court first looks to the words themselves for the answer. (*Ibid.*) Moreover, the court is required to give effect to statutes according to the usual, ordinary import of the language employed in framing them.

(*Id.*, at pp. 658-659.) The various parts of a statutory enactment must be harmonized by considering the particular clause or section in the context of the statutory framework as a whole. (*Id.*, at p. 659).

Applying these rules to interpret the Stull Act, we begin with section 44660. That section expresses the intent of the Legislature that governing boards ". . . establish a uniform system of evaluation and assessment of the performance of all certificated personnel . . . The system shall involve the development and adoption . . . of objective evaluation and assessment guidelines . . ." *Nowhere in section 44660 is there any statement about the consequence to the district of the governing board's failure to establish such a system or to adopt such guidelines.* Neither do we find in other sections of the Stull Act a statement that any disability or consequence flows from the failure to adopt guidelines for evaluation and assessment of the performance of certificated employees.

We do find in section 44932 specific provisions which limit the causes for dismissal of permanent employees. One of the causes for dismissal is "incompetency" (§ 44932, subd. (d)). In the second paragraph of section 44934 appears the requirement that "Any written statement of charges of . . . incompetency shall specify instances of behavior and the acts or omissions constituting the charge so that the teacher will be able to prepare his defense. It shall . . . also set forth the facts relevant to each occasion of alleged . . . incompetency." Section 44938 provides additional requirements which must be satisfied before the governing board of any school district may act upon any charges of incompetency. These provisions include the requirement that the written notice shall include the evaluation made pursuant to section 44660 et seq.

Plaintiffs do not contend that incompetency is not a proper cause for dismissal of Takahashi. Neither do they urge any procedural deficiency in the contents of the notices of incompetency under the statutory provisions reviewed above. Their sole contention is that the Stull Act evaluation appended to the notice of incompetency given to Takahashi on January 8, 1980, does not satisfy the requirement of section 44938 that the evaluation be made pursuant to section 44660 et seq. Plaintiffs argue the evaluation could not have been made as required in the absence of the guidelines mandated by section 44660.

In *Tarquin v. Commission on Professional Competence* (1978) 84 Cal. App. 3d 251, the court addressed the issue of compliance with section 13407. That section is identical with section 44938 of the Reorganized Education Code (Stats. 1976, ch. 1010, as amended by ch. 1011, eff. April 30, 1977). The court concluded that the district did not comply with section 13407 for several reasons. One reason was the district's failure to comply with section 13489 (now § 44664) by not giving the teacher an evaluation of his performance during the school year in which he was given notice of his alleged incompetency. The district was, therefore, without jurisdiction to proceed on the charges of incompetency. (*Id.*, at pp. 258-259.)

Plaintiffs do not dispute the fact that an evaluation of Takahashi's performance accompanied each of the notices of incompetency. In the notices, the district described the attached evaluations as having been made pursuant to section 44660 et seq. We believe the evaluations which the district attached to the notices of incompetency to Takahashi complied with the provisions of section 44664. They were pro-

vided within the time limits specified in that section. In addition, they included recommendations as to areas of improvement in the performance of Takahashi as required by that section. They also contained a notice to Takahashi in writing that she was not performing her duties in a satisfactory manner and they described such unsatisfactory performance. Finally, the evaluators conferred with Takahashi after the evaluations and made specific recommendations as to areas of improvement in her performance. They also provided assistance to her in improving her performance. This assistance included provision of textbooks and a course of instruction on improving classroom discipline and control and visits to other classrooms.

We find nothing in the *Tarquin* decision to support a conclusion that the district lacked jurisdiction to proceed on the charges of incompetency against Takahashi. Neither do we believe it is logical or reasonable to conclude that it was the intent of the Stull Act that such be the consequence of failure of the district's governing board to adopt guidelines for assessing teacher incompetency. The numerous safeguards which the framers of that legislation included to assure full and complete due process in any attempted dismissal are inconsistent with such an intent. The requirement of a full statement of the charges and a specification of the acts, omissions and facts relevant to each occasion of alleged incompetency are but a few of these safeguards. Additionally, we note the provisions of section 44944 governing the conduct of the hearing by the Commission on Professional Competence on the charges against the teacher and governing the composition of the Commission. The two members selected by the governing board and the teacher must hold a current-

ly valid credential and "have at least five years' experience within the past ten years in the discipline of the employee." (§ 44944, subd. (b).)

One final consideration arising from the particular nature of the charged incompetency in the present case convinces us that the Legislature never intended that failure to adopt the uniform written guidelines called for by section 44660 result in a wholesale jurisdictional bar to the dismissal of incompetent employees. The essence of the charge against Takahashi was that she was unable to maintain an orderly classroom.⁴ Maintenance of appropriate classroom behavior is extremely difficult to quantify; one can imagine (with horror) uniform guidelines framed in terms of permissible decibel levels or schedules of acceptable incidents of misbehavior per unit of time or student population. The lack of empirical standards applicable to this area of teacher competence mandates that evaluation of teacher performance be left to those with the professional experience and skill to meaningfully assess classroom order — fellow educators assisted by a judicial officer, as is contemplated by section 44944.

The only extrinsic aid to interpretation provided by the briefs is the reference by the amicus curiae to a law review article written by the author of the Stull Act,⁵ the legislation

⁴It is undisputed that Takahashi's students met the academic standards appropriate to measure the skill with which she imparted information relevant to the subjects she covered. We view as no less important than academic knowledge the teaching of standards of civilized behavior necessary to the functioning of society. Order and discipline should never be exalted to the detriment of learning or of the concepts basic to a free society, but neither should appropriate group behavior be discarded as irrelevant to the educational process. A school which produced well-educated sociopaths would be as inimical to democracy as one which created well-educated robots.

which enacted the relevant provisions of the Education Code.

In construing a statute, the motives or understandings of individual legislators who cast their vote for it may not be considered as evidence of legislative intent. (*In re Marriage of Bouquet* (1976) 16 Cal.3d 583, 589.) This rule applies even though the motives offered are those of the author of the legislation being construed. (*Id.*, at pp. 589-590.) A legislator's statement is evidence of legislative intent only if it provides the history of the legislation — events which occurred or arguments made during its passage. (*California Teachers Assn. v. San Diego Community College Dist.*, *supra*, 28 Cal.3d 692, 700; *In re Marriage of Bouquet*, *supra*, at p. 590.) These standards for consideration of legislators' statements go to admissibility, rather than weight, of the evidence offered. (*California Teachers Assn.*, *supra*, at p. 701.)

Nothing in the article written by Mr. Stull is a reiteration of legislative discussion or events or gives an indication of arguments made during consideration of the statute by the Legislature. Therefore, this court may not consider that article as evidence of the Legislature's intent in enacting the Stull Act.

We have discovered only one judicial expression of statutory interpretation relevant to the Education Code sections at issue. That appears in *Certificated Employees Council v. Monterey Peninsula Unified Sch. Dist.* (1974) 42 Cal.App. 3d 328. In that case a school district had adopted the guidelines called for by section 44660, and teachers' unions sought to enjoin application of the guidelines because the district had not consulted with the teacher organizations (but had

³Stull, *Why Johnny Can't Read — His Own Diploma* (1979) 10 Pacific L.J. 647.

utilized individual teachers) in formulating the guidelines. (*Id.*, at pp. 331-332.) In holding that the Stull Act was not subject to the "meet and confer" requirements of other legislation, the Court of Appeal stated:

"Nor do we think that the Stull Act is exclusively a tenure regulation. As indicated above, in Stull, 'intent of the Legislature [was] to establish a uniform system of evaluation and assessment of the performance of certificated personnel' by requiring 'the development and adoption by each school district of objective evaluation and assessment guidelines' (§ 13485 [recodified as 44660 by Stats. 1976, ch. 1010, § 2, p. 2384]). Stull does not require that school districts use the guidelines for determining tenure *nor does it require any other consequence. While many school districts will undoubtedly utilize the evaluation and assessment guidelines in making determinations of tenure, in and of itself this fact does not make them tenure regulations.*" (*Id.*, at p. 336, emphasis supplied.)

We interpret the opinion in *Certificated Employees Council v. Monterey Peninsula Unified Sch. Dist.*, *supra*, 42 Cal.App.3d 328 to mean that the failure of the district to establish guidelines as required by section 44660 does not have any effect upon the district's powers. Admittedly, that court was not presented with factual circumstances in which any consequences could arise, since the district there had adopted the required guidelines. Nonetheless, we believe an interpretation of sections 44660 and 44938 which entirely prevents the district from dismissing incompetent teachers would not be consonant with that court's view of the Stull Act.

Plaintiffs argue that guidelines are essential to an objective evaluation and that the importance of such an evaluation

justifies the consequence they assert in this case. To illustrate the importance of the objective standards, our attention is directed to *San Dieguito Union High School Dist. v. Commission on Professional Competence* (1982) 135 Cal.App.3d 278. We do not find that case material to the resolution of the issue of whether failure to adopt guidelines for assessing teacher incompetency precluded compliance with section 44938 in this case. *San Dieguito* and the cases cited therein uniformly involve causes for dismissal other than incompetency — such as excessive absences, sex offenses, or drug violations. The danger in such situations (where the offense purporting to justify dismissal involves questions of moral turpitude or unfitness to teach) that a lack of objective standards will vest unbridled discretion in the districts and trial courts, is not present where incompetence is alleged and is, as in this case, supported by allegations of specific conduct. The evidence presented to the commission, and upon which the trial court exercised its independent judgment, established that Takahashi received notice of the allegations of incompetence far in advance of the filing of accusations of incompetency; she was provided with suggestions for improvement; and she was given an opportunity to demonstrate improvement in her performance in the relevant particulars. If, as we believe, the Stull Act was intended to encourage regular evaluations and to avoid arbitrary evaluations and dismissals, common sense dictates there was compliance with section 44938 in this case.

Sufficiency of the Evidence

The decision of the Commission on Professional Competence, which the trial court reviewed pursuant to plaintiffs' petition for writ of mandate, found cause for dismissal of a

permanent certified employee of the school district. On such a review, the trial court must exercise its independent judgment as to the evidence presented to the commission. (*Pasadena Unified Sch. Dist. v. Commission on Professional Competence* (1977) 20 Cal.3d 309, 314; *San Dieguito Union High School Dist. v. Commission on Professional Competence*, *supra*, 135 Cal. App.3d 278, 283.) The trial court applied the independent judgment standard in the present case.

The trial court's judgment must be upheld on appeal if supported by substantial evidence. (*Ibid.*) All conflicts in the evidence must be resolved by the appellate court in favor of the party prevailing in the superior court, and that party must be given the benefit of every reasonable inference in support of the judgment. (*Pasadena Unified Sch. Dist. v. Commission on Professional Competence*, *supra*, at pp. 313-314.) Where the trial court's findings are challenged, based on insufficiency of the evidence, the appellant bears the heavy burden of showing that there is no substantial evidence to support those findings. (*Division of Labor Law Enforcement v. Transpacific Transportation Co.* (1979) 88 Cal. App. 3d 823, 829.) The reviewing court starts with the presumption that the record contains evidence to sustain every finding of fact. (*Forman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881.) The power of the appellate court begins and ends with the determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the finding of fact. (*Ibid.*) Substantial evidence means evidence which is of ponderable legal significance — evidence that is reasonable in nature, credible and of solid value. (*H. Russell Taylor's Fire Prevention Service, Inc. v.*

Coca-Cola Bottling Corp. (1979) 99 Cal.App.3d 711, 726.) As the trier of fact, the trial court is the sole arbiter of all conflicts in the evidence, conflicting interpretations thereof, and conflicting inferences which reasonably may be drawn therefrom; is the sole judge of the credibility of the witnesses; may disbelieve them even though they are uncontradicted if there is any rational ground for so doing, one such reason for disbelief being the interest of the witnesses in the case; and, in the exercise of sound legal discretion, may draw or may refuse to draw inferences reasonably deducible from the evidence. (*Johnson v. Pacific Indem. Co.* (1966) 242 Cal.App.2d 878, 880.)

Applying the above rules to the present case, we conclude there was sufficient evidence to support the trial court's decision that "[i]n the aggregate, the events and facts [found by the court to be true] constitute cause for the dismissal of [Takahashi] . . ."

The judgment of the trial court is affirmed.

Hamlin, J.

WE CONCUR:

Andreen, Acting P. J.

Martin, J.

In the Court of Appeal of the State of California
in and for the Fifth Appellate District

Court of Appeal
Fifth Appellate District

FILED

July 14, 1983

Kevin A. Swanson, Clerk

CALIFORNIA TEACHERS ASSOCIATION

et al.,

Plaintiffs and Appellants,

5 CIVIL No. 6622

(F000235)

vs.

GOVERNING BOARD OF THE

LIVINGSTON UNION SCHOOL DISTRICT

(Merced Co. Super.

Ct. No. 65267)

et al.,

Defendants and Respondents.

**ORDER MODIFYING OPINION AND
DENYING REHEARING**

BY THE COURT:

It is ordered that the opinion filed herein on June 20, 1983, and certified for publication in the Official Reports (_____ Cal.App.3d_____), be modified in the following particulars:

At the end of the incomplete paragraph at the top of page 14, add as footnote 6, the following:

⁶Our conclusion that failure to adopt uniform written guidelines for evaluation of a teacher's performance in the area of classroom order and discipline does not deprive a school district of jurisdiction to proceed with dismissal for incompetency does not mean that school districts may ignore the mandate of section 44660. We express no opinion as to what remedies may exist to compel school districts to comply with section 44660, but emphasize that a jurisdictional bar to dismissal proceedings for incompetency relating to classroom order and discipline is not one of them.

Appellants' petition for rehearing is denied.

Dated July 14, 1983.

Hamlin, J.

WE CONCUR:

Andreen, Acting P. J.

Martin, J.

CLERK'S OFFICE, SUPREME COURT

4250 STATE BUILDING

SAN FRANCISCO, CALIFORNIA 94102

AUG. 17, 1983

I have this day filed Order

HEARING DENIED

BIRD, J. OF THE OPINION THAT THE

PETITION SHOULD BE GRANTED.

In re: 5 Civ. No. 6622.

CALIF. TEACHERS' ASSN.;

mitsue takahashi

vs.

GOVERNING BD. — LIVINGSTON UNION

SCHOOL DIST., et al.

Respectfully,

Clerk

APPENDIX B

Section 1 of the Fourteenth Amendment to the United States Constitution:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

California Education Code § 44660.

It is the intent of the Legislature that governing boards establish a uniform system of evaluation and assessment of the performance of all certificated personnel within each school district of the state, including schools conducted or maintained by county superintendents of education. The system shall involve the development and adoption by each school district of objective evaluation an assessment guidelines which may, at the discretion of the governing board, be uniform throughout the district, or, for compelling reasons be individually developed for territories or schools within the district, provided that all certificated personnel of the district shall be subject to a system of evaluation and assessment adopted pursuant to this article.

This article does not apply to certificated personnel who are employed on an hourly basis in adult education classes.

California Education Code § 44662.

(a) The governing board of each school district shall

establish standards of expected student achievement at each grade level in each area of study.

(b) The governing board of each school district shall evaluate and assess certificated employee competency as it reasonably relates to (1) the progress of students toward the established standards, (2) the performance of those noninstructional duties and responsibilities, including supervisory and advisory duties, as may be prescribed by the board, and (3) the establishment and maintenance of a suitable learning environment within the scope of the employee's responsibilities.

(c) The governing board of each school district shall establish and define job responsibilities for those certificated noninstructional personnel, including, but not limited to, supervisory and administrative personnel, whose responsibilities cannot be evaluated appropriately under the provisions of subdivision (b), and shall evaluate and assess the competency of such noninstructional certificated employees as it reasonably relates to the fulfillment of those responsibilities.

(d) The evaluation and assessment of certificated employee competence pursuant to this section shall not include the use of publishers' norms established by standardized tests.

(e) Nothing in this section shall be construed as in any way limiting the authority of school district governing boards to develop and adopt additional evaluation and assessment guidelines or criteria.

CERTIFICATE OF SERVICE

I hereby certify that printed copies of the Petition for Writ of Certiorari to the Court of Appeal of the State of California in and for the Fifth Appellate District for Petitioner Mitsue Takahashi in the above-captioned case have been served upon those parties listed below by placing the same in the United States Mail, postage prepaid, properly addressed, this 14th day of November, 1983, to:

Clerk of the Supreme Court
Supreme Court of the United States
One First Street, N.E.
Washington, D.C. 20543
(original plus 40 copies)

Paul Loya, Esq.
ATKINSON, ANDELSON, LOYA, RUUD & ROMO
Attorneys at Law
1811 Santa Rita Road, Suite 102
Pleasanton, CA 94566
(one copy)

I declare under the penalty of perjury that the foregoing is true and correct.

Executed on November 14, 1983, at Fresno, California.

FRESNO DAILY LEGAL REPORT

By *D.M. Webster Jr.*

83-1029

Office - Supreme Court, U.S.

FILED

DEC 19 1983

ALEXANDER L. STEVAD,
CLERK

IN THE SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1983

5 Civ. No. 6622

MITSUE TAKAHASHI, *Petitioner*

vs.

GOVERNING BOARD OF THE LIVINGSTON UNION
SCHOOL DISTRICT; LIVINGSTON UNION SCHOOL
DISTRICT OF THE COUNTY OF MERCED, STATE
OF CALIFORNIA; COMMISSION ON PROFESSIONAL
COMPETENCE; AND DOES I THROUGH V, INCLU-
SIVE, *Respondents*.

BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI TO THE COURT
OF APPEAL OF THE STATE OF CALIFORNIA
IN AND FOR THE FIFTH APPELLATE DISTRICT

Paul M. Loya
Atkinson, Andelson, Loya,
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Attorney for Respondents

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IN THE SUPREME COURT
OF THE
UNITED STATES

October Term, 1983

5 Civ. No. 6622

MITSUE TAKAHASHI, Petitioner

vs.

GOVERNING BOARD OF THE LIVINGSTON
UNION SCHOOL DISTRICT; LIVINGSTON
UNION SCHOOL DISTRICT OF THE COUNTY
OF MERCED, STATE OF CALIFORNIA; COM-
MISSION ON PROFESSIONAL COMPETENCE;
AND DOES I THROUGH V, INCLUSIVE,
Respondents.

BRIEF IN OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI

Respondents respectfully pray that a
writ of certiorari to review the deci-
sion of the Court of Appeal of the State
of California in and for the Fifth
Appellate District entered in the
above-entitled action on June 20, 1983,

be denied.

OPINIONS BELOW

On November 6, 1980, Respondent Commission on Professional Competence of the Livingston Union School District issued its findings of fact and conclusions that Petitioner is incompetent to teach and guilty of two instances of false testimony and ordered the dismissal of Petitioner from her teaching position at the Livingston Union School District.

On June 9, 1981, the Superior Court of the County of Merced, State of California, sustained the findings of fact and conclusions of the Commission On Professional Competence and found Petitioner guilty of unclean hands due to her false testimony at the administrative hearing. (Respondents' Appendix A, pp. 1-11). Thereupon, the

Court entered judgment denying Petitioner's writ of mandate. (Appendix A to Petition, pp. 1-2).

On June 20, 1983, the Court of Appeal of the State of California in and for the Fifth Appellate District affirmed the judgment of the Superior Court of the County of Merced. (Appendix A to Petition, pp. 3-16, and reported at California Teachers Assn. v. Governing Board (1983) 144 Cal.App. 3d 27, ___ Cal.Rptr. ___.

On July 14, 1983, the Court of Appeal of the State of California in and for the Fifth Appellate District denied Petitioner's petition for rehearing. (Appendix A to Petition, p. 17).

On August 17, 1983, the California Supreme Court denied Petitioner's request for hearing, R.Bird, C.J. dissenting. (Appendix A to Petition, p. 18).

JURISDICTION

Jurisdiction of the Court has been invoked by Petitioner under 28 U.S.C. §1257(3). However, Respondents argue that the Court lacks jurisdiction in this case under this statute or any other statute.

STATUTE INVOLVED

California Education Code §44932(d):

No permanent employee shall be dismissed except for one or more of the following causes:

. . .

(d) Incompetency.

QUESTIONS PRESENTED

1. Whether the United States Supreme Court lacks jurisdiction in this case.
2. Whether the Court of Appeal gave full consideration to the issues and decided them correctly.

STATEMENT OF THE CASE

The Petition asks for review of the decision of the Court of Appeal of the State of California sustaining the termination of a public school teacher of the Livingston Union School District. On May 12, 1980, the Governing Board of the Livingston Union School District gave notice to Petitioner of its intent to dismiss her from her position as a permanent teacher because of incompetency (CT 136-140^{1/}). See California Education Code Section 44932(d)^{2/}. Petitioner requested a hearing pursuant to Section 44943, and a

^{1/} CT 136-140 refers to pages 136-140 of the trial court clerk's transcript, Merced County Superior Court Case No. 65267.

^{2/} All statutory references are to the California Education Code unless otherwise indicated.

hearing was held on October 21, 22 and 23, 1980, before the Commission on Professional Competence.

The Commission consisted of one administrative law judge from the State Office of Administrative Hearings, and two appointees who are credentialed to teach and who had served at least five of the previous ten years teaching in the same discipline as Petitioner (Section 44944). The Commission sustained the charges submitted to it and found Petitioner incompetent to teach. In addition, the Commission found Petitioner guilty of two instances of false testimony.

On December 4, 1980, Petitioner sought review of the Commission's decision in the Superior Court of the State of California for the County of Merced. The Court, applying the indepen-

dent review test (Section 44945), sustained the decision of the Commission on Professional Competence. The Court found the factual determinations of the Commission to be correct (CT 85-90). See Respondents' Appendix A, pp. 1-11) The Court also found Petitioner guilty of unclean hands due to her false testimony at the administrative hearing (CT 90).

Petitioner appealed the judgment of the Superior Court to the California Court of Appeal, Fifth Appellate District, on the grounds that:

1. The Court's finding of incompetence was not supported by substantial evidence;
2. The District violated Education Code Section 44660 et. seq. by allegedly failing to adopt measurable uniform goals or

objectives for maintenance of a suitable environment in the classroom.

3. The Court's finding of unclean hands was not supported by substantial evidence.

On June 20, 1983, the Court of Appeal issued a decision affirming the judgment of the Superior Court.

Petitioner petitioned for a hearing before the California Supreme Court, which was denied on August 17, 1983.

STATEMENT OF FACTS

Petitioner Mitsue Takahashi was an eighth grade teacher. Over a period of several school years, Petitioner showed an inability to control the pupils in her classroom. The District's dissatisfaction with this lack of discipline in classroom control, an important shortcoming for a teacher of eighth grade

students particularly, was communicated to her frequently and forcefully. Her classrooms were observed, and suggestions for improvement were given over an extended period of time. She was advised to read certain texts and treatises on classroom discipline. She was taken to other classes in other schools to observe teachers who successfully controlled their classrooms. (Tr. 152:12-28) ^{3/} Throughout this drawn out, patient process of waiting, helping and observing, however, Petitioner not only was unable to improve her perfor-

^{3/} References to the Reporter's Transcript of the dismissal hearing before the Commission on Professional Competence on October 21-23, 1980, are indicated by the symbol Tr. followed by the page number, a colon and the line numbers. The Reporter's Transcript was filed in the Merced County Superior Court for the State of California, Case No. 65267.

mance, but also seemed unwilling or unable to even acknowledge that a serious problem existed.

Therefore, dismissal proceedings were finally brought against Petitioner, based on the observations and evaluations of three separate administrators. Mr. Dale Eastlee was Petitioner's principal and immediate supervisor at Selma Herndon School during the 1977-1978 and 1978-1979 school years (Tr. 32:22-28; 33:1-2). He has a Master's Degree and a General Services Administrative credential, and has also taught grades two through eight. (Tr. 33:5-25)

On several occasions during the 1977-1978 school year, Eastlee observed loud, disruptive, undisciplined and uncontrolled student behavior in Peti-

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tioner's classroom.^{4/} Eastlee reported his observations to Petitioner and offered her suggestions for improving classroom discipline.

In her formal evaluation at the end of the 1977-1978 school year (CT 157), Petitioner was again informed of the need to correct her lack of control over the students and of concern with her relations with students and parents. The evaluation stated that Petitioner "either can't, or won't, face the realization that she cannot function as an effective classroom junior high teacher under the circumstances that now

^{4/} The dates and details of the specific instances of student misconduct and classroom disorder, as observed and documented, are presented in the Merced County Superior Court's Findings of Fact and Conclusions of Law. (See Respondents' Appendix A, pp. 1-11.)

exist," and that "if satisfactory improvement is not shown in classroom management and student control, formal dismissal procedures will be initiated during the 1978-1979 school year."

The District, in fact, waited an extra year to begin dismissal proceedings, in the hope that Petitioner would show improvement. Yet Petitioner, as always, simply refused to understand the seriousness of her situation and, in fact, did not seem to realize that something was wrong (Tr. 41:19-22).

Petitioner's problems with classroom management and control continued during the 1978-1979 school year (Tr. 110:16-18). During Dale Eastlee's tenure as principal at Selma Herndon School, the District continually made suggestions to Petitioner for improving her control of the classroom, and in fact provided

a course in classroom discipline and control (Tr. 44:5-24).

Beginning in the 1979-1980 school year, Petitioner's principal at Selma Herndon was Hamilton Brannan (Tr. 104:19-21). Mr. Brannan is extensively qualified as an administrator (Tr. 104-106) and author on educational subjects, including a book on improving discipline in the schools. Mr. Brannan was notified prior to accepting the principalship that Petitioner had received one notice of unsatisfactory performance, but he told the superintendent that he would make his own independent evaluation and judgment (Tr. 106:19-28; 107:1).

During the 1979-1980 school year, Brannan observed numerous instances of uncontrolled, disruptive and destructive student behavior in Petitioner's class-

room as well as Petitioner's inadequate and ineffective teaching methods.

Three separate administrators made independent, objective observations and evaluations and concluded that Petitioner exhibited a serious lack of control over her classroom and other fundamental flaws in her teaching.

At no time during the hearing did Petitioner present evidence tending to establish her competency. In fact, Petitioner's expert witness, Dr. Lester Roth, never did testify that Petitioner was not incompetent (Tr. 260, et seq.).

In attempting to rebut the charges against her, Petitioner testified falsely during the hearing. (CT 89) The Court found that the false testimony constituted unclean hands. CT 90.

SUMMARY OF THE ARGUMENT

Review by the United States Supreme

Court is precluded in this case for lack of jurisdiction under 28 U.S.C. §1257(3) or any other statutory provision. No real and substantial federal question, constitutional or otherwise, exists now or has been previously raised on a proper and timely basis in the state courts. The Court of Appeal was presented no federal questions or issues, and its decision rested solely on independent and adequate state grounds involving the interpretation and application of state law under the Education Code. Moreover, Petitioner was denied relief based on her unclean hands.

In addition, the Court of Appeal correctly and fairly found that substantial evidence supported the Superior Court's judgment of Petitioner's incompetency to teach and upheld Petitioner's

dismissal from her teaching position. Affirming that all statutory requirements, including numerous notices and an administrative hearing, were accorded Petitioner, the Court of Appeal properly interpreted and applied state law with respect to the evaluation and dismissal of Petitioner from her teaching position.

Turning on the particular facts of this case and the application of state law regarding teacher dismissals, the issues here are not of interest to the general public nor do they rise to the level of a national concern. Therefore, this case is not sufficiently important to warrant the extraordinary jurisdiction and attention of the United States Supreme Court.

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ARGUMENT

I. THE UNITED STATES SUPREME COURT LACKS JURISDICTION IN THIS CASE.

A. No Real And Substantial Federal Question Exists In This Case.

Petitioner has invoked jurisdiction of the United States Supreme Court under 28 U.S.C. §1257(3). As applied in this case, this statute allows review by this Court ". . . where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under the United States."

Under 28 U.S.C. §1257(3), the Court's jurisdiction to review the decision of the Court of Appeal of the State of California in and for the Fifth Appellate District in this action as prayed by Petitioner in her Petition

for Writ of Certiorari, is dependent entirely upon the existence of a federal question. St. Louis, I.M. & S.R. Co. v. Taylor (1908) 210 U.S. 281.

The mere presence of a federal question on the face of the petition will not sustain jurisdiction unless the federal question raised by Petitioner is "real" and "substantial." If it appears the question is wholly formal, a matter of conjecture, based upon false assumption, clearly not debatable, or plainly devoid of merit, then the question is considered insubstantial and does not permit review by this Court. Equitable Life Assur. Soc. v. Brown (1902) 187 U.S. 308; Zucht v. King (1922) 260 U.S. 174.

The present case involves no real and substantial federal question, much less the one asserted by Petition-

er. Petitioner asserts the question of whether her dismissal as a public school teacher for failure to "maintain a suitable learning environment" violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution. This question is merely a matter of conjecture on the part of Petitioner, and not the real question in the case in any sense. The present litigation concerns the substantive and procedural laws of the State of California.

Specifically, this case involves interpretation and application of the Stull Act, Cal. Educ. Code §§44660--44665 (West) [hereinafter cited as Education Code §XXX or §XXX or Stull Act.]. Reliance on the interpretation of state law, pursuant to the Stull Act, in this case as the underlying ground for the decision in both the Superior

Court and the Court of Appeal is clear. (Appendix A to Petition, p. 7-14). In fact, Petitioner admits in her current Petition that the primary question, presented and determined first in the Merced County Superior Court and subsequently in the Court of Appeal of the State of California, Fifth Appellate District, was whether Petitioner's discharge violated the Stull Act under the statutory requirements of §§44660 and 44662. (Petition, p.6).

The California Court of Appeal affirmed the Superior Court's decision that Petitioner's dismissal did not violate the Stull Act since a failure to establish guidelines as required by Education Code §44660 does not affect the District's powers to dismiss Petitioner. (Appendix A to Petition, pp. 7-14).

In addition, the Court of Appeal affirmed the Superior Court's finding that Petitioner's alteration of her testimony before the Commission on Teacher Competence constituted unclean hands. This state procedural issue of unclean hands, in conjunction with the determinative issue of interpretations of the state Stull Act, must be viewed as the "real" and "substantial" question in this matter.

In spite of Petitioner's attempts to frame the determinative issue in this case in constitutional due process dimensions (Petition, p.3), the strategic reliance on the phrase "due process" by Petitioner should be regarded as mere form. Any due process issues involved in this case arise out of state law pursuant to statutory requirements under the Stull Act.

Contrary to the jurisdictional requirements under 28 U.S.C. §1257(3), the question presented in this case is grounded in state substantive and procedural law, not federal law, and by no stretch of reality or imagination, can be considered real or substantial. Therefore, the question does not fall within the jurisdictional purview of this Court.

B. A Federal Question Was Not Properly and Timely Raised In The State Courts

Jurisdiction in the United States Supreme Court is only permitted when the substantial federal question required under 28 U.S.C. §1257(3) has been raised in a proper and timely manner in the state courts. United States Supreme Court Rule 21.1(h) specifically requires that Petitioner "specify the stage in the proceedings,

both in the court of the first instance and in the appellate court, at which the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed upon by the court." A thorough examination of the Petition in this case indicates that Petitioner failed to set forth with any specificity and clarity the precise stages of the legal proceedings at which the question of due process under the United States Constitution was raised, the manner in which this particular federal question was raised, or even the way in which the Court of Appeal or any other state court ruled on the question of constitutional due process.

It is a long-established rule that while no particular form of words or phrases is necessary, the jurisdiction

of the United States Supreme Court to review the final judgment of a state court can arise only if the record as a whole shows either expressly or by clear implication that the federal claim was adequately and timely presented in the state system. New York ex rel. Bryant v. Zimmerman (1928) 278 U.S. 63, 67; Prune Yard Shopping Center v. Robins (1980) 447 U.S. 74, 85 n.9. If nothing exists expressly or implicitly in the record that a federal question was presented to the state court, the Court should not take judicial notice that a federal question might have been involved in the case. Yazoo and M.R. Co. v. Adams (1901) 180 U.S. 41. The record filed with the Supreme Court must show that the federal questions were raised properly in the state courts. Live Oak Water Users' Assoc. v. Railroad

Com. of California (1926) 269 U.S.
354.

The Court on several occasions has ruled that when "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." Bailey v. Anderson (1945) 326 U.S. 203, 206-207; Street v. New York (1969) 394 U.S. 576, 582. The decision and opinion of the California Court of Appeal, the highest state court in this case, is completely devoid of any express or implicit reference to or determination of any federal question under the Due Process Clause. Any use of the phrase "due process" in the Court of Appeal opinion is in no instance linked to the

Federal Constitution or to any cases relying on the Due Process Clause. Rather, the Court of Appeal used the term "due process" only with reference to the procedural statutory safeguards entailed in the Stull Act.

Since the Court of Appeal failed to mention or pass upon any federal question regarding the Due Process Clause, while basing its decision upon the assurance of procedural due process safeguards required under state statutory law (the Stull Act), it should be presumed that the Court's of Appeal omission was due to Petitioner's absence of proper presentation of a constitutional due process question in the state courts.

Petitioner has, in fact, failed to raise or present any federal questions, including the violation of constitu-

tional rights under the Due Process Clause at either the state Superior Court or Court of Appeal level. Although Petitioner did refer to the phrase "due process" on a few occasions in the proceedings in both the Merced County Superior Court and later in the California Court of Appeal, at no time did she cite expressly or rely implicitly on the United States Constitution or any cases based on the Due Process Clause of the United States Constitution. To the contrary, in argument both before the Superior Court and Court of Appeal, Petitioner discussed her deprivation of "due process" in terms of the alleged failure of the District to comply with state law under the Stull Act.

Petitioner relied solely upon the California case of Anderson v. San Mateo Community College District (1978)

87 Cal.App.3d 441, 151 Cal.Rptr. 111. The Anderson case dealt with the question of judicial review in a case involving a college's compliance with its rules and regulations and the California Education Code. The case raised no federal issues and cited no federal authorities including the United States Constitution.

The circumstances in the present case are comparable to those arising in the case of Webb v. Webb (1981) 451 U.S. 493, in which the Court held that it was without jurisdiction where the record disclosed that the petitioner failed to raise her federal claim in the Georgia courts and that the Georgia Supreme Court failed to rule on a federal issue.

In Webb v. Webb, the petitioner used the phrase "full faith and credit" on

several occasions in the state court proceedings, but without citing the Federal Constitution or any cases relying on the Full Faith and Credit Clause of the Federal Constitution. The Court noted that the parties' appellate briefs to the Georgia Supreme Court ignored any federal issue and simply argued the application of state law to the facts of the case. Likewise, the Georgia Supreme Court, believing no federal issue was presented, based its decision on the requirements of Georgia state law.

Further, the Court pointed out that the petitioner had not even claimed the court's failure to reach the federal claim in her petition for rehearing before the Georgia Supreme Court. Hence, the Court declared that it could not conclude on the record presented that

the petitioner had properly and timely raised a federal claim under the Full Faith and Credit Clause of the United States Constitution. Id., at 498.

The Court has consistently refused to consider and determine federal constitutional issues which are asserted for the first time on review of state court decisions. Cardinale v. Louisiana (1969) 394 U.S. 437; Tacon v. Arizona (1973) 410 U.S. 351; University of California Regents v. Bakke (1978) 438 U.S. 265. In the present case, the Court should decline to address the constitutional issue Petitioner has not timely and properly raised in the lower courts.

- C. Since The Court of Appeal Decision In This Case Rested On Independent And Adequate State Grounds, Review By The United States Supreme Court Is Precluded.
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It is well-settled that the Supreme Court of the United States will not review the final judgment of a state's highest court which rests upon adequate and independent state (nonfederal) grounds. Bell v. Maryland (1964) 378 U.S. 226, on remand 236 Md. 356, 204 A.2d 54; Smith v. Smith (1961) 366 U.S. 210; Copperweld Steel Co. v. Industrial Com. of Ohio (1945) 324 U.S. 780. Merely because a state constitution or statute has some similarity to corresponding provisions of federal law does not mean that a federal question is presented since construction of the state provision is strictly a matter to be determined by the state courts. Such a determination is binding on the Court. Miller's Exrs. v. Swann (1893) 150 U.S. 132.

The overriding consideration is that

the decisions of state courts control; state courts speak with final authority on matters of state law. Mullaney v. Wilken (1975) 421 U.S. 684. The Court has itself stated that it is not the function of the United States Supreme Court on reviewing decisions of the state's highest court to construe a state statute contrary to construction given it by the highest court of the state. Landmark Communications, Inc. v. Virginia (1978) 425 U.S. 829.

The decision of the highest state court hearing and ruling on the matters in this case was issued on June 20, 1983, when the California Court of Appeal, Fifth Appellate District, affirmed the judgment of the Merced County Superior Court. (Appendix A to Petition, pp. 3-16) Although subsequently, Petitioner requested a hearing

in the California Supreme Court, the request was denied on August 17, 1983 (Appendix A to Petition, p. 18) and, hence, the judgment of the highest state court considered here is that of the Court of Appeal on June 20, 1983.

The legal issues presented to and determined by the Court of Appeal involved only state law . No federal question was presented to the Court of Appeal and, likewise, the Court of Appeal never considered or made any determination of a federal question in either its holding or opinion.

While the Court of Appeal decision is absolutely devoid of grounds involving a federal question or issue, the state grounds for the Court's decision are firmly expressed in the holding and opinion in the case. The Court identified the single issue presented to it by

Petitioner:

Plaintiffs do not contend that incompetency is not a proper course for dismissal of Takahashi. Neither do they urge any procedural deficiency in the contents of the notices of incompetency under the statutory provisions reviewed above. Their sole contention is that the Stull Act evaluation appended to the notice of incompetency given to Takahashi on January 8, 1980, does not satisfy the requirement of Section 44938 that the evaluation be made pursuant to section 44660. Plaintiffs argue the evaluation could not have been required in the absence of guidelines mandated by section 44660. Id. at p. 9.

Petitioner was also denied relief at the state level based on her "unclean hands". See Cal.Jur.3d, Equity, Section 25 at page 460. She was found to have falsely testified in defending her dismissal.

In its conclusion, the Court of Appeal affirmed the trial court's findings that 1) cause for dismissal of

Petitioner for incompetency had been established, 2) notices given to Petitioner by the District complied with the procedural requirements of California Education Code Sections 44938 and 44660, et seq., and 3) Petitioner's false testimony before the Commission on Teacher Competence constituted unclean hands. Clearly, these are independent state substantive and procedural grounds upon which the Court of Appeal based its decision.

II. THE COURT OF APPEAL DECISION
GAVE FULL CONSIDERATION TO
THE ISSUES AND DECIDED THEM
CORRECTLY.

A. Due Process Guarantees of the
Fourteenth Amendment Were Not
Denied.

The thrust of the Petition is that Petitioner was not given adequate forewarning of the conduct expected of her. In fact, the notice of problems in

Petitioner's teaching performance and the attempts to help her improve rise quantum levels above what a reasonable person might expect.

Petitioner was terminated from her job with the Livingston Union School District because of incompetency. Cal. Educ. Code §44932(d) (West).

The procedure for terminating a teacher in California follows. The employee may demand a hearing to determine if cause for dismissal exists. A formal adjudicative procedure under the California Administrative Procedure Act (Government Code Sections 11500-11528) governs the dismissal process. Prior to the hearing, full discovery rights including depositions and interrogatories are allowed. The decision is made by a Commission on Professional Competence. The Commission consists of

an Administrative Law Judge of the State of California, an appointee of the school district and an appointee of the teacher involved. The two appointees must both have at least five years of experience in the same discipline as the teacher being terminated, and the five years of experience must have occurred within the previous ten years. Section 44944.

The decision of the Commission on Professional Competence is binding on the governing board of the school district. A terminated teacher may appeal the decision of the Commission on Professional Competence to the Superior Court. The Superior Court will review the record of the hearing and make a decision based upon an independent review of the evidence. Sections 44944, 44945. In the case at bench,

the Petitioner appealed the decision of the Commission to the Superior Court.

Before an employee is dismissed for incompetency, the employee must have been given written notice of the incompetency "specifying the nature thereof with specific instances of behavior and with particularity as to furnish the employee an opportunity to correct his faults and overcome the grounds for such a charge." Section 44938.

In the case at bench, the findings of fact in the Superior Court clearly show the extent to which Petitioner's rights were protected. (See Respondents' Appendix A, pp, 1-11, attached hereto.) As the findings show, Petitioner was exhibiting deficiencies in controlling student discipline in

January of 1978. Further incidents occurred through May 12, 1980, when notice of termination was given. Problems ranged from failure to stop or attempt to stop the unruly behavior of students, to improper classroom techniques, to failure to respond to vulgar language of her students. On one occasion, students played soccer inside the classroom, screamed loudly and ran in and out of the room for ten minutes without abatement. On May 24, 1979, and again on January 8, 1980, Petitioner was given notices of incompetency specifying specific problems, instances of behavior and giving her an opportunity to correct the problems. These events are detailed in Appendix A, pp. 1-11.

Petitioner's failure to correct the deficiencies, even after specific

notice of deficiencies, and instances of unsatisfactory performance caused her termination. Respondents did not violate due process protections of the Fourteenth Amendment.

B. Petitioner's Argument Is Without Merit In That The Cases Relied Upon By Petitioner Are Distinguishable.

The essential question presented by Petitioner in her Petition queries whether her dismissal from her teaching position for failure to "maintain a suitable learning environment" violates the Due Process Clause of the Fourteenth Amendment of the United States Constitution. As argued by Respondents above, the issue as presented by Petitioner incorrectly suggests that the appellate court decision was, and the Court's decision should be based on, a violation of the Due Process Clause.

Petitioner confounds her initial mistake by erroneously arguing that her dismissal for failure to "maintain a suitable learning environment" is unconstitutionally vague, and proceeds to argue at length the existence of a discrepancy between the Court of Appeal decision and legal precedent under the "void-for-vagueness" doctrine. Having initially misidentified the issue in this case, Petitioner now relies upon legal precedent which is distinguishable in law, fact or both from the present case, and, further, fails to acknowledge precedent more appropriate to the real issues in this case.

In support of her argument of unconstitutionality for vagueness, Petitioner cited only three prior cases heard by the Court. Although

each of these cases addresses vagueness under the Due Process Clause, each is readily distinguishable from the present case and not on point.

First, Petitioner cites Connally v. General Construction Company (1927) 269 U.S. 385, as the seminal case on vagueness. Indeed, Connally is well-recognized for a profound statement on vagueness as a violation of due process of law. Connally, however, involved the constitutionality of a statute, and, in particular, a criminal statute providing criminal penalties. Likewise, the cited case of Jordon v. DeGeorge (1951) 341 U.S. 223, involved the constitutionality of a statute identifying the penalties for a "crime of moral turpitude." In the present case, Petitioner does not challenge the constitutionality of the statute per se but rather its interpre-

tation or application by the District under very specific circumstances. In contrast to the cases cited by Petitioner, this is a civil case involving the application of provisions of the California Education Code resulting in no criminal penalties.

This distinction between civil and criminal law is important in that "[T]he standards of certainty in statutes punishing for offenses is higher than in those depending primarily upon civil sanction for enforcement." Winters v. New York (1948) 333 U.S. 507, 515. The essential purpose of the 'void for vagueness' doctrine is to warn individuals of the criminal consequences of their conduct. Williams v. United States (1951) 341 U.S. 97.

In the past, the Court has relied upon a test of reasonableness in apply-

Appeal finally stated ". . . we believe an interpretation of Sections 44660 and 44938 which entirely prevents the district from dismissing incompetent teachers would not be consonant with that court's view of the Stull Act." (Appendix A to Petition, p. 13.)

The Court's of Appeal reliance on Monterey Peninsula to interpret the Stull Act and to determine the relevance of objective evaluation guidelines to teacher dismissal highlights the real issue in this case. Contrary to Petitioner's contentions, the underlying issue is not whether her dismissal was based on unconstitutionally vague standards of incompetency. The real issue here is the interpretation and application of California state law in accordance with legislative intent and compliance with statutory safeguards in

specific cases.

Petitioner goes to great lengths to seek out numerous law review articles and other miscellaneous publications to promote her vagueness argument. These academic articles do not relate to the specific facts in this case. The variety of incidents in Petitioner's classroom involving the lack of discipline, Petitioner's poor evaluations, the numerous attempts by her superiors to assist in her improvement, as well as the documented steps taken to preserve her due process rights according to state law, document the facts, not theory, of the present case.

The decision of the Court of Appeal in this case was both correct and fair. The decision properly interpreted and applied state law in the dismissal of Petitioner and assured compliance with

legislative intent, state practice, and all required constitutional safeguards.

CONCLUSION

For the foregoing reasons, Respondents respectfully submit that a writ of certiorari should be denied in this case.

Dated: December 14, 1983

Respectfully submitted,

ATKINSON, ANDELSON, LOYA,
RUUD & ROMO

By


PAUL M. LOYA

Attorneys for Respondents

ing the "void for vagueness" doctrine to particular circumstances. In Jordon, 341 U.S. at 231, the Court stated:

We have several times held that difficulty in determining whether certain marginal offenses are within the meaning of the language under attack as vague does not automatically render a statute unconstitutional for indefiniteness. United States v. Wurzbach, 280 U.S. 396, 399 (1930). Impossible standards of specificity are not required. United States v. Petrillo, 332 U.S. 1 (1947). The test is whether the language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. Connally v. General Construction Co., 269 U.S. 385 (1927).

The Court then proceeded to determine that the test had been satisfied in Jordon because the phrase "crime involving moral turpitude" did not lack sufficiently definite standards to justify the deportation proceeding. Id. at 232. The Court clarified imoli-

the different factual circumstances and the substantial difference in the required level of judicial scrutiny.

Notably, Petitioner cites Connally, Jordon, and Cramp for the principle underlying the vagueness doctrine, but then fails to show in any way whatever how they apply to the present factual circumstances. The Court has clearly stated that due process guarantees vary with factual and institutional contexts. Morrissey v. Brewer (1972) 408 U.S. 471, 481.

Petitioner relies also upon three lower federal court cases. These cases, too, are not on point and provide little support for Petitioner's position. In Burton v. Cascade Union School District (D.Oregon 1973) 353 F.Supp.254, a teacher who was admittedly a practicing homosexual was dismissed from her

position on the basis of "immorality". Under the circumstances of Burton, the statutory term "immorality" was held constitutionally vague.

Petitioner fails to demonstrate how factually or legally the Burton holding relates to the present situation. Here, findings of fact and conclusions by the Commission on Teacher Competence and the Superior Court, later upheld by the Court of Appeal, substantiate in many specific instances how and when Petitioner failed to "maintain a suitable learning environment." This specificity removes any vagueness in the phraseology.

Likewise, Petitioner mistakenly relies on Parducci v. Rutland (M.D. Ala. N.D. 1970) 316 F.Supp. 352 and Dean v. Timpson Independent School District (E.D. Texas 1979) 486 F.Supp. 302. Both

are academic freedom cases involving choice of teaching method and First Amendment rights. These cases are not applicable to the present case since, as noted previously, cases concerned with fundamental rights require a different standard of judicial scrutiny than cases, such as this, involving no fundamental rights.

Another important distinction between Parducci and Dean and the present case is the degree to which standards are provided. Parducci involved a total absence of standards since no school policy existed for the selection and assignment of outside materials. The Parducci holding was expressly limited to the special circumstances of the case. Parducci, 316 F.Supp. at 357.

Similarly, in Dean, no duly promul-

gated policy regarding use of an ethnic survey existed. To the contrary, in the present case, school board policies delineated the teachers' responsibilities in maintaining a suitable learning environment.

Better authority lies in the cases of Blunt v. Marion County School Board (C.A. 5 Fla. 1975) 515 F.2d 951 and Gwathmey v. Atkinson (E.C. Va. 1976) 447 F.Supp. 1113. In Blunt, the court upheld the dismissal of a teacher of 25 years where she utilized group teaching techniques inefficiently, exhibited instructional deficiencies, failed to keep proper records and grade students' work, and exhibited hostility to superiors when they offered assistance. The Court held that due process was satisfied in that substantial evidence supported the school board's

finding that the teacher was incompetent.

Likewise, in Gwathmey, a teacher's dismissal withstood constitutional attack. The Court held that evidence supported the school board's finding of incompetence where the plaintiff had not been directly teaching students or following suggestions of his superiors. Similarly, in the present case, first the Commission on Teacher Competence, then the Merced County Superior Court and subsequently, the California Court of Appeal confirmed that sufficient evidence existed to justify Petitioner's dismissal for incompetence.

Petitioner relies heavily on case authority from California and other states' courts. Although the Court is not bound by state case authority, it is noteworthy that the facts in each of

Petitioner's cited cases vary considerably from the present situation. When Petitioner offered some of these same cases in her Court of Appeal argument, the Court of Appeal rejected any basis for comparability between cases involving other causes for dismissal and the present case:

The danger in such situations (where the offense purporting to justify dismissal involves questions of moral turpitude or unfitness to teach) that a lack of objective standards will vest unbridled discretion in the districts and trial courts, is not present where incompetence is alleged and, as in this case, supported by allegations of specific conduct. Appendix A to Petition, p. 14.

The key case which Petitioner should have, but failed to address, is Certificated Employees Council v. Monterey Peninsula Unified School Dist. (1974) 42 Cal.App.3d 328, 116 Cal.Rptr. 819, which the Court of

Appeal considered singlely important in the present case as the "one judicial expression of statutory interpretation relevant to the Education Code sections at issue." (Appendix A to Petition, p. 12.) The Court of Appeal acknowledged the following significant point in the Monterey Peninsula case:

Stull does not require that school districts use the guidelines for determining tenure nor does it require any other consequences. While many school districts will undoubtedly utilize the evaluations and assessment guidelines in making determinations of tenure, in and of itself this fact does not make them tenure regulations. Monterey Peninsula, 42 Cal.App.3d at 336.

The Court of Appeal interpreted Monterey Peninsula to mean that the District's failure to create guidelines pursuant to Education Code Section 44660 had no effect on the District's powers of teacher dismissal. The Court of

cations of the decision in other more difficult cases by stating that ". . . doubt as to the adequacy of a standard in less obvious cases does not render that standard unconstitutional for vagueness." Id.

Accordingly, the Court has on many occasions ruled that statutory language under attack survives under the vagueness doctrine: "political purposes," United States v. Wurzbach (1930) 280 U.S. 396; "reasonable variations shall be permitted," United States v. Shreveport Grain & Elevator Co. (1932) 287 U.S. 77; "any offensive, derisive or annoying word," Chaplinsky v. New Hampshire (1942) 315 U.S. 568.

More recently, in the case of Rose v. Locke (1975) 423 U.S. 48, the Court clarified certain limitations on application of the vagueness doctrine.

. . . [t]his prohibition against excessive vagueness does not invalidate every statute which a reviewing court believes could have been drafted with greater precision. Many statutes will have some inherent vagueness, for "[i]n most English words and phrases there lurk uncertainties." Robinson v. United States, 324 U.S. 282 (1945). Even trained lawyers may find it necessary to consult legal dictionaries, treatises, and judicial opinions before they may say with any certainty what some statutes may compel or forbid. . . All the Due Process Clause requires is that the law give sufficient warning that men may conduct themselves so as to avoid that which is forbidden. Id., at 49.

The third and final United States Supreme Court case cited by Petitioner is Cramp v. Board of Public Instruction of Orange County (1961) 368 U.S. 278. Although Cramp involves the dismissal of a public school teacher, it is not on point. Cramp dealt with the constitutionality of a loyalty oath statute applied to public school teach-

ers. This case involves application of California teacher evaluation statutes in the dismissal of a public school teacher. While Cramp concerned fundamental First Amendment rights, this case involves no such fundamental constitutional rights.

A stricter standard of judicial scrutiny is required in First Amendment and other fundamental rights cases. Smith v. Goquen (1974) 415 U.S. 566, 572-573. In Cramp, 368 U.S. at 287, the Court declared:

The vice of unconstitutional vagueness is further aggravated where, as here, the statute in question operates to inhibit the exercise of individual freedoms affirmatively protected by the Constitution . . . stricter standards of permissible statutory vagueness may be applied to a statute having a potentially inhibiting effect on speech.

Consequently, Petitioner's reliance on Cramp is seriously misplaced in view of

to shut up." Petitioner apologized but otherwise ignored the screams, and turned to the filmstrip projector to start the lesson. The screaming continued for some time until the student saw the principal in the doorway.

18. On November 27, 1979, petitioner's class was in a disorganized and uncontrolled state. Some groups of students were working, others were talking, three boys were wrestling over a roll of masking tape until told to stop. Petitioner did not respond to the noise or movement but walked around talking to individual students. According to the lesson plans, the class should have been involved in a whole group activity.

19. On January 25, 1980, petitioner exhibited inadequate methods and techniques of teaching. The task analysis

for permutation problems in math was prepared but not followed. There was no anticipatory set to establish the purpose and focus of the lesson. There was no opportunity for students to restate what they had learned.

20. On March 20, 1980, from 9:45 to 10:04 a.m., petitioners's eighth grade class diagrammed sentences and later changed to math. Students shouted out answers or requests for help even though petitioner asked them to raise their hands. To get students' attention, she shouted over their voices, but this made little difference in the students's attention.

21. On April 15, 1980, questions posed by petitioner on square roots were formulated in such an unclear manner that they prompted loud and confusing total group responses. Petitioner did

not manage the classroom environment adequately to provide for effective teaching and active learning. Students were allowed to behave in a disorderly manner (loud talking, laughter, jokes, mimicking) without any consequences or demands from petitioner that they stop this behavior.

22. On April 22, 1980, a parent requested that her child be transferred from petitioner's class, on the grounds that there was no discipline in her classroom, nobody understood the assignments she gave, and the students who want to study are unable to do so because of the disorder.

23. On May 8, 1978, and on numerous subsequent occasions, petitioner was informed of the need to correct her lack of control over the students and of concern with her relations with students

and parents.

24. Petitioner's testimony that the events described in paragraph 18 occurred during a break between classes, and that the observation described in paragraph 21 was altered after it had been shown to her was false and not entitled to credit.

25. Throughout the time periods in issue here, petitioner was given the opportunity to respond in writing to the various charges against her, but never did so respond within the allotted time periods.

From the foregoing facts, the court concludes:

Conclusions of Law

1. In the aggregate, the events and facts described above constitute cause for the dismissal of petitioner from her position as a permanent certificated

employee of the District under Section 44932(d) of the Education Code.

2. Each of the notices described in finding 3 complied with the procedural requirements of Section 44938 of the Education Code. The evaluations attached to those notices complied with Section 44660, et seq. of the Education Code.

3. The facts described in finding 24 constitute unclean hands by the petitioner.

Dated: June 9, 1981

DONALD R. FRETZ
Judge of the Superior Court

CERTIFICATE OF SERVICE

I hereby certify that photostatic copies of the Brief in Opposition to Petition for Writ of Certiorari to the Court of Appeal of the State of California in and for the Fifth Appellate District for Respondents in the above-captioned case have been served upon those parties listed below by placing the same in the United States Mail, postage prepaid, properly addressed, this 14th day of December, 1983, to:

Clerk of the Supreme Court
Supreme Court of the United States
One First Street, N.E.
Washington, D.C. 20543
(original plus 40 copies)

Mary Louise Frampton
Frampton, Karshmer & Kesselman
925 N. Street, Suite 150
Fresno, California 93721-2256
(one copy)

I declare under penalty of perjury that the foregoing is true and correct.

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SUPERIOR COURT OF CALIFORNIA

COUNTY OF MERCED

CTA; MITSUE TAKAHASHI,

Petitioners,

v.

No. 65267

LIVINGSTON UNION SCHOOL
DISTRICT, et al.,

Respondents.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

Findings of Fact

1. Harold H. Thompson made the accusation in his official capacity of Superintendent of the Livingston Union School District.

2. At all times material herein,

petitioner was employed as a permanent certificated employee of the District.

3. Two separate notices of incompetency were personally served on petitioner on April 24, 1979 and January 8, 1980, respectively. Each of the notices specified the nature of the incompetency and gave specific instances of behavior with such particularity as to furnish to petitioner an opportunity to correct her fault and to overcome the grounds for the charge of incompetency. Each of the notices included an evaluation made pursuant to Article 11, commencing with Section 44660, of Chapter 3 of Part 25 of the Education Code.

4. On May 12, 1980, the Superintendent filed a statement of charges against petitioner with the Governing Board of the District.

5. On May 12, 1980, the Governing Board of the District resolved to give notice of intention to dismiss to petitioner.

6. On May 12, 1980, petitioner was personally served with the notice of intention, a statement of charges, and a copy of the applicable provisions of the Education Code.

7. On June 9, 1980, petitioner requested a hearing.

8. On January 9, 1978, in petitioner's classroom between 1:00 and 1:45 p.m., petitioner failed to exercise classroom and student control as alleged in paragraph 1 of the statement of charges.

9. On October 16, 1978, at 2:45 p.m., students were playing soccer inside petitioner's classroom, screaming loudly, and running in and out of the

room. This activity continued for approximately ten minutes.

10. On November 3, 1978, at 1:05 p.m., students were yelling in class and were disturbing office personnel by yelling over the intercom.

11. On November 17, 1978, at 10:00 a.m., students were observed standing at the backdoor of petitioner's classroom yelling to students on the playground.

12. On May 16, 1979, from 1:00 to 1:15 p.m., in and near petitioner's classroom, three boys were wrestling and yelling outside the backdoor. Students were wandering around the room, visiting and yelling. One boy threw a pencil across the room to a friend, telling him to sharpen it for him. One girl was reading a magazine and told petitioner "she didn't feel like doing work that day." She continued to read the maga-

zine. One girl sat outside for the duration of the period, stating simply that she did not want to go to class.

13. On June 8 , 1979, Joe Holt, a maintenance man, overheard vulgar language by various students in petitioner's class and in her presence. These conversations were lengthy and loud enough for Holt to hear while working under the sink, and caused Holt to stand up to see if petitioner was still in the room.

14. On September 26, 1979, in petitioner's classroom, several conversations not related to the lesson were going on between students while she tried to conduct the lesson. She often asked questions and immediately answered them herself, thus not giving students a chance to answer. The petitioner failed to realize which issues students had

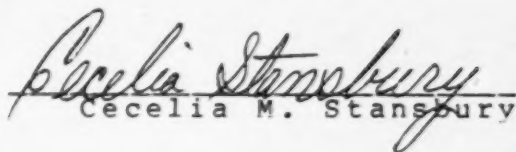
strong feelings about, and thus missed great opportunities for discussion. Class time and material were used with no demonstrated objective, learning or evaluation.

15. On October 24, 1979, petitioner's class was observed from 10:45 to 11:17 a.m. There was no planning of lessons, and no learning objective or focus for the lesson. Her plan book showed few lessons actually planned in advance and clearly determining the objective.

16. On October 23, 1979, a student was transferred to another room so she could resume learning. This student was unable to work effectively in petitioner's classroom because of noise and confusion in the class.

17. On November 14, 1979, a girl student was screaming at petitioner, "you don't have to poke me, just tell me

Executed on December 14, 1983,
at Pleasanton, California.


Cecelia M. Stansbury